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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. ~~4447~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER ZENITH RADIO CORPORATION.

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IN THE

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OCTOBER TERM, 1969.

No. 1117

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER ZENITH RADIO CORPORATION.

CITATIONS AND OPINIONS BELOW.

The first opinion of the Court of Appeals (A. 4238)* is reported in 388 F. 2d 25. The second opinion of the Court of Appeals (AA. 54) is reported as *Hazeltine Research, Inc.* v. *Zenith Radio Corporation,* at 418 F. 2d 21. The opinion of this Court (AA. 4) is reported in 395 U. S. 100.

* The printed appendix in No. 49, October Term, 1968 is referred to with the letter prefix A. The additional printed appendix herein, covering proceedings following remand and certain trial court proceedings not previously printed, is referred to with the prefix AA.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 27, 1969 and its mandate stayed on November 6, 1969 (AA. 62). The petition for certiorari was filed on January 26, 1970 and was granted by this Court on March 16, 1970. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

STATUTES INVOLVED.

The statute and rule provisions involved are:

Section 1 of the Sherman Act, 15 U. S. C. § 1, providing in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 4 of the Clayton Act, 15 U. S. C., § 15, providing:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

Section 5(b) of the Clayton Act, 15 U. S. C. § 16(b), viding in pertinent part:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. . . ."

Section 5(b) of the Clayton Act (15 U. S. C. § 16(b)); providing in pertinent part:

> "Whenever any civil or criminal proceeding is in-

stituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: . . ."

Rule 52(a) of the Federal Rules of Civil Procedure providing in pertinent part:

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

Rule 12(h) of the Federal Rules of Civil Procedure as amended Jan. 21, 1963, effective July 1, 1963 and in force at the time pertinent to this cause, providing in pertinent part:

"A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or if he has made no motion, in his answer or reply, . . ."

Rule 8 (c) of the Federal Rules of Civil Procedure providing in pertinent part:

"In pleading to a preceding pleading, a party shall set forth affirmatively . . . release . . . and any other matter constituting an avoidance or affirmative defense. . . ."

Rule 7 of the Federal Rules of Civil Procedure providing in pertinent part:

"There shall be a complaint and an answer; a reply to a counterclaim denominated as such; . . . No other pleading shall be allowed, . . ."

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the court below had jurisdiction under this Court's mandate which was limited to "further proceedings consistent with this opinion" to construe such mandate as remanding the issue of damages to the Court of Appeals "to consider the effect of HRI's affirmative release and statute of limitations defenses on the award"?

2. Whether the court below, by failing to accept the reasonable inferences and conclusions of the trial court drawn from the undenied testimony and documents, usurped the functions of the trial court as the trier of facts contrary to Rule 52(a) of the Federal Rules of Civil Procedure?

3. Whether the court below had jurisdiction under this Court's mandate to vacate the District Court's findings and award of $6,297,391 before trebling and to grant a new trial of the damage award?

4. Whether the court below in attempting to limit petitioner's recovery on a new trial to the damage period starting June 5, 1959 and limiting petitioner's damages to those flowing from the June 5, 1959 injury was in conflict with the decisions of this Court on treble damage recovery in this and other cases?

5. Whether the court below had jurisdiction or was in conflict with the decision of this Court in the instant case in determining that illegal acts prior to the damage period can be used to reduce petitioner's damage award in the face of this Court's holding that "the record evidence is sufficient to support the finding of damage resulting from events occurring after the beginning of the damage period"?

6. Whether the court below had jurisdiction to grant a new trial to determine whether injury occasioned by acts prior to the damage period could be utilized to reduce

petitioner's damage award in the face of this Court's opinion that "It is enough that the illegality is shown to be a material cause of the injury; the plaintiff need not exhaust all possible alternative sources of injury in fulfilling its burden of proving injury under § 4"?

7. Whether the court below was in conflict with the decisions of this Court in this and other cases in reserving for future determination the question of whether the treble damage award which is based on proofs held legally sufficient by this Court is or is not excessive?

8. Whether the statute of limitations under § 5(b) of the Clayton Act was tolled during the pendency of *United States* v. *General Electric, et al.* (Civil Action No. 140-157, S. D. N. Y.) filed by the government on November 24, 1958 in the Southern District of New York, in which government proceedings Hazeltine was named as a co-conspirator in the same conspiracy asserted in the instant case?

9. Whether the release given Hazeltine's co-conspirators three years before the damage period involved here had begun can be utilized as barring or reducing recovery in any action under the antitrust laws for damages accruing during the damage period?

10. Whether the statute of limitations can be asserted where the damages caused the petitioner were limited by the trial court to those occasioned by an illegal conspiracy during a time not barred by the statute of limitations?

11. Whether the court below in determining that the affirmative defenses of release and statute of limitations had not been waived under Rule 12(h) of the Federal Rules of Civil Procedure and that the trial court did not hold them waived pursuant to said Rule was in conflict with the decision of this Court in the instant case?

12. Whether the court below rendered a decision in

conflict with the decision of this Court in the instant case in holding that HRI's release and statute of limitations defenses asserted more than a year after the trial of this case justify vacating the damage award and judgment of the District Court in the amount of $6,297,391 before trebling entered on April 5, 1965?

STATEMENT OF THE CASE.

In November, 1959 Hazeltine Research, Inc. (HRI), an Illinois corporation which owns and licenses domestic patents principally in the radio and television field, brought suit in the Northern District of Illinois, claiming that Zenith television sets infringed HRI's patents. The trial court held this suit was instituted by HRI as a part of a conspiracy to bar Zenith television and radio sets from the Canadian market (A. 11, 2857, 2905-6).

On May 22, 1963 Zenith filed a counterclaim against HRI for treble damages and injunctive relief, setting up violations of the Sherman Act resulting from misuse of HRI patents, including the one in suit, by virtue of the conspiracy between HRI, Hazeltine and the patent pool in Canada. Zenith proved that the Canadian patent pool known as Canadian Radio Patents Ltd. had refused to license patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American made radios and television sets into Canada. See Findings XXV through XXXII (A. 2903-2906).

The District Court, sitting without a jury, ruled for Zenith in the infringement action. On the counterclaim, HRI and Hazeltine, the parent company, were found to have conspired with foreign patent pools which had excluded Zenith from the Canadian, English and Australian electronics markets. See Findings XV through XXIV (A.

2899-2903) and Findings XXXIII through XXXV (A. 2906-2907). The District Court held Zenith entitled to an injunction and to $35,000,000 in treble damages. The Court of Appeals below reversed the judgment on the ground that no fact of damage had been proven. 388 F. 2d 25 (7th Cir., 1968).

This Court granted certiorari (391 U. S. 933) to consider, among other things, whether the Court of Appeals properly discharged its function under Rule 52(a) of the Federal Rules of Civil Procedure which specifies that the findings of fact made a district court sitting without a jury are not to be set aside unless "clearly erroneous."

This Court affirmed the court below so far as the treble damage award involved the English and Australian patent pools. But so far as the Canadian pool was concerned it held the court below "was clearly in error." This Court said (AA. 18):

> "This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith's products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

How much that share was lessened was demonstrated by proof that Zenith, in the comparable American market, and against substantially the same competition, had during the damage period 16% to 20% of the American market while in the Canadian market, and against the pool,

Zenith could only obtain 3% during the same period (Def. Ex. 220, A. 2661).

Both Joseph S. Wright, petitioner's president, and Sam Kaplan, petitioner's treasurer, testified without objection or denial (A. 457) that without the interference by the Canadian pool Zenith would have obtained as large a share of the Canadian market as it obtained in the United States during the damage period.

Sam Kaplan, the chief financial officer of Zenith, testified without denial (A. 527-8) that free of the pool's restrictions "that we could accomplish in Canada the same percentage of industry we were able to accomplish in the United States. Now this takes into consideration the similarities between the countries, the effect of our advertising which overlaps and spills back and forth between the countries and the nature of our competition."

Kaplan was examined on the foundation proof of Zenith's books and records used in the damage computation as follows (A. 524):

> "Q. Can you tell us whether or not those books were kept in the regular course of business or whether or not they are correctly kept?
>
> Mr. Dodds (HRI counsel): Your Honor, I stipulate that they are kept in the regular course of business and are correct. No question about it.
>
> The Court: All right. That solves that."

The computation of the amount of Zenith's damages in Canada was prepared by Willis Stevenson, a certified public accountant and a member of the American Institute of Accountants, and the manager of Internal Auditing at Zenith (A. 495-6).

The witness testified as to the source of his figures, as to the different product lines of Zenith—television, radio, hi-fi, stereo and color television (A. 501-2). He testified

how he had tabulated it by five periods, starting June 1, 1959 and ending May 31, 1963, and the witness produced his worksheets showing his computations (A. 502, Def. Ex. 218; A. 2641). The figures in Canada were transcribed from government sources in Ottawa, Canada (A. 505) and the whole computation was put together as Def. Ex. 220 (A. 2661). *The exhibit was admitted in evidence without objection.*

In computing the lost sales in the Canadian market caused by the combination and conspiracy complained of, the witness said (A. 513-4):

> "In the Canadian market we have started with a base of the market, which I have previously described, for each of the five periods. We have applied the Zenith share of the domestic market expressed as a percentage for each of these five periods to arrive at a Zenith share of the Canadian market, expressed in units.
>
> "The Court: Assuming their share would be what, the same as it is in America or what?
>
> "The Witness: The same as it is in the United States."

The witness then said (A. 514):

> "From that number of units I have deducted the number of units we actually sold in the Canadian market in each of these five periods to arrive at the lost sales in the market, expressed in units. To these units I have applied a Zenith average factory selling price to Canada of sets, within these five periods, actual experience of our selling price to arrive at the lost sales in that market expressed in U.S. dollars at the factory selling price level . . . To the figure of lost sales in the market, I have applied the percentages of profit applying to additional volume of business and arrived at the lost profit on the lost sales, also expressed in U. S. dollars."

The witness said he followed that same method for each of the five periods (A. 514) and tabulated the computations in defendant's exhibit 220 (A. 513).

The witness testified from the schedule, his work sheets and on the basis of the formula described, and said:

> "In the Canadian market for the period June 1 to December 31, 1959, in television the lost profit was $708,028; in radio, $138,048 (A. 517). In 1960, with respect to television, the lost profit was $1,116,597, and for radio $145,371. [In] 1961 sir, the lost profit in television was $1,348,867; in radio $68,241. In 1962, the lost profit on television was $1,883,774, and on radio $75,622; for 1963, for the first five months, January through May, the lost profit in television was $769,630, and in radio, $43,213." (A. 518.)

Nowhere in this record is there any countervailing evidence to the above proof of the amount of petitioner's damage.

On the basis of this undenied evidence, the trial court found the amount of Zenith's Canadian damage to be $6,297,391 and on April 5, 1965 pursuant to Rule 54(b) of the Federal Rules of Civil Procedure awarded petitioner treble damages in the amount of $19,042,173 for loss of sales and profits in Canada by reason of the activity of the Canadian patent pool known as Canadian Radio Patents Limited (A. 3078).*

This Court in reviewing the damage proofs said (AA. 19):

> "We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period * * * HRI frankly conceded the continuation of the pool before the District Court, and it appears sufficiently clear that throughout this time Zenith was deprived of what always had been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada."

* This judgment also included $150,000 as damages for the misuse of HRI patents.

Continuing, the Court said (AA. 24):

> "Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it had enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed."

This Court then reversed the court below on the Canadian damage issue and remanded the case for further proceedings "consistent with this opinion" (AA. 40).

On remand to the Court of Appeals Zenith filed a motion asking that the Hon. Walter J. Cummings, Circuit Judge, recuse himself on the ground that said Judge had been the attorney for Western Electric Company, a subsidiary of American Telephone and Telegraph Co. in the case of *Zenith* v. *RCA, et al.*, involving the same antitrust violations by Canadian Radio Patents Limited, for the statutory period prior to October, 1957, at which time that case was settled. The record shows that said Walter J. Cummings executed the stipulation on behalf of Western Electric Co., which dismissed the case and was engaged for several years in defending Western Electric Company, a member of the pool, against the antitrust violations which were asserted by Zenith (AA. 49).

Zenith's motion for Judge Cummings to recuse himself was promptly denied (AA. 52) and in further proceedings

on remand, Zenith was forced to argue the issues before a judge who had appeared as its antagonist in the earlier case and opposed each and every contention made by Zenith, which contentions involved the same illegal conspiracy and its effect on Zenith's Canadian business prior to the 1957 settlement. On the remand, the court below undertook to hear *de novo* issues disposed of by this Court's opinion; proceeded to order a re-hearing in the trial court of the Canadian damage issue; vacated the April 5, 1965 damage judgment and then with no showing that the trial court had in any manner abused its discretion in refusing a new trial, proceeded to grant HRI the right to attempt to try the case all over again with evidence not shown to be "newly discovered" in order "to show that Zenith's damage flowing from 'damage causing acts' within the period had not amounted to $6,297,391" (AA. 61). No concurrent right was granted Zenith to show that the damages exceeded the allowed amount and by Footnote 3 of the opinion Zenith was denied the right to plead the tolling of the statute of limitations pursuant to Section 5(b) of the Clayton Act (AA. 59).

The court below vacated the trial court's judgment of damage on the ground that the statute of limitations which did not cover the four-year damage period nevertheless barred some part of the damage amount which might be found to be attributable to pre-damage period acts and which may have resulted in damage which did not occur until after the beginning of the four-year damage period.

The court below admits in its opinion that the evidence of loss of profits upon which the damage award was based was legally sufficient to make out a prima facie case. Since there was no countervailing evidence in the record it is quite apparent that the court below, contrary to the directions in this Court's opinion and contrary to the provisions

of Rule 52 (a) of the Federal Rules of Civil Procedure again substituted its own opinion for that of the trial court. This results in a complete negation of this Court's opinion and this Court's admonition that (AA. 23):

> "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiff.' "

Nowhere in this record is there any evidence that petitioners loss of profits during the damage period was occasioned by anything other than the illegal Canadian pool of which HRI was a member and which HRI admitted existed during the entire four-year damage period from June 1, 1959 to May 31, 1963.

SUMMARY OF ARGUMENT.

I.

THE EVIDENCE OF THE AMOUNT OF PETITIONER'S DAMAGE IN CANADA IS LEGALLY SUFFICIENT UNDER THE DECISIONS OF THIS COURT.

The decision of the court below that petitioner's damage must be computed as allocated to particular overt acts done pursuant to the conspiracy within the damage period is not legally tenable under this Court's decision in *Bigelow* and other treble damage cases.

Once the fact of damage has been proved, the trier of the facts can make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly. The court below concedes that the comparison between the free market in the United States and the restricted market in Canada is relevant data and concedes it to be *prima facie* evidence of the amount of petitioner's damage. Since there was no countervailing evidence this proof was conclusive in the instant case.

The argument that Zenith had to prove it had a mature market position at the beginning of the damage period is not tenable in the face of evidence showing that respondent and its co-conspirators had, by an illegal conspiracy, prevented petitioner from making such proof. Further, petitioner's damage exhibit which assumed petitioner had a mature market position at the beginning of the damage period was admitted without objection.

II.

THIS COURT DID NOT GRANT AUTHORITY TO THE COURT BELOW TO ORDER A NEW TRIAL ON THE CANADIAN DAMAGE ISSUE.

There was no showing that the trial court abused its discretion in refusing to grant a new hearing on the Canadian damage issue. And it was admitted that such motion was not based on newly discovered evidence. There was no showing that evidence sought to be offered at a new trial was either unavailable at the time of the original trial or could not have been then offered. Nowhere in this Court's opinion and mandate is there any authority granted the court below to grant a new trial and without such grant the court below had no authority to do so.

The claim that the case involves an erroneous ruling of law by the trial court is not supported by the record because neither the defense of the statute of limitations nor the defense of the 1957 release had any application to damages accruing in the period of June 1, 1959-May 31, 1963.

The court below gave no deference to the findings of the trial court or to the *Bigelow* case as a precedent. And its attempt to limit petitioner's damages to proof of an overt act within the damage period which damaged petitioner is untenable. The decision of the court below is in conflict with the statement of this Court that "the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done."

III.

THERE IS NO MERIT IN THE "BELATEDLY RAISED" DEFENSES OF STATUTE OF LIMITATIONS AND RELEASE AND THEY WERE WAIVED.

A. The Statute of Limitations Is Not Applicable to Petitioner's Damage Claims.

The court below has adopted an untenable argument that the statute of limitations can be used to bar proof of overt acts outside the damage period even though the damage caused by these acts does not accrue until a time within the damage period.

Under the express terms of the statute of limitations it starts to run "after the cause of action accrued." The cause of action does not accrue until the damage is sustained. Therefore damages accruing during the damage period are not barred even though some part of the activity causing damage started or occurred prior to the damage period. It is therefore unnecessary to segregate the overt acts occurring before and within the damage period where the damage they caused "accrued" within the four years before suit was commenced.

Since the only damage sought or recovered in the instant case was the loss of profits accruing in the four-year damage period, there was no mistake of law on the part of the trial court in refusing to reopen the case to permit respondent to put irrelevant proof into the record and the entire defense of the statute of limitations was therefore irrelevant.

B. The Statute of Limitations Was Tolled in the Instant Case.

Under the decisions of this Court and the decisions of two Courts of Appeal the government antitrust case of *United States* v. *General Electric, et al.* (Civ. No. 140-157) in which Hazeltine was named a co-conspirator tolled the statute of limitations with respect to the instant case.

The contrary *Sun Theatre* decision of the court below was decided before Section 5 of the Clayton Act was amended by the Congress in 1955 and is in conflict with the decisions of this Court and of the Third and Eighth Circuits. Such conflict should be resolved by this Court so that the statute is tolled against named conspirators such as Hazeltine during the pendency of a government suit involving the same subject matter.

C. The RCA-Zenith 1957 Release Could Not Affect Zenith's Damage Claim From June 1, 1959 to May 31, 1963.

The release could not bar the cause of action which did not accrue prior to the damage period. To hold otherwise would be to construe the release as releasing future damages under the antitrust laws and therefore void as against public policy. As this Court said in its opinion, once Zenith demonstrated that its exports had been restained by the pool "the treble damage liability of the domestic participants in the conspiracy was beyond question." Here Zenith's exports were restrained by the pool during the entire damage period.

D. In Any Event the Affirmative Defenses of Statute of Limitations and Release Were Waived.

An affirmative defense which is not pleaded as required by Rule 8 (c) of the Federal Rules of Civil Procedure is waived under Rule 12 (h) of the same Rules. It cannot be revived by a motion for summary judgment in the manner attempted here. No showing was made that would justify the trial court in entertaining these defenses a year after the case was tried. The charge that Zenith had changed its damage theory and that therefore the delay was excused was properly rejected by the trial court as a sham.

ARGUMENT.

I.

UNDER THE DECISIONS OF THIS COURT IN THIS AND OTHER CASES, THE EVIDENCE OF THE AMOUNT OF PETITIONER'S DAMAGE IN CANADA IS LEGALLY SUFFICIENT TO SUPPORT THE DISTRICT COURT'S DAMAGE FINDINGS AND THE APRIL 5, 1965 JUDGMENT.

In its opinion in the instant case this Court said (AA. 30):

> "The purpose of giving private parties treble damages and injunctive remedies was not merely to provide private relief, but was to serve as well the high purposes of enforcing the antitrust laws."

This comment is particularly apt in the instant case because the combination which petitioner faces is world-wide in scope and respondent owns over 500 domestic and foreign patents licensed through patent pools to control the electronics markets of the world (Def. Ex. 1, A. 946).

In their answer to the petition in this case, respondent seeks to cast itself in the role of a small company harrassed and overborne by petitioner. However, respondent does not point out that it has been found to be in a conspiracy with the following companies with world-wide connections in the electronics business. These companies are: Australian Radio Technical Services and Patents Co.; Amalgamated Wireless Ltd.; Canadian Marconi Co.; Canadian Westinghouse, Ltd.; Northern Electric, Ltd.; Standard Radio, Ltd.; Canadian Radio Patents, Ltd.; Electrical and Musical Industries, Ltd.; General Electric Co., Ltd.; Marconi Wireless Telegraph Co., Ltd.; Philips Electric Co., Ltd.; Pye, Ltd.; Standard Telephone & Cables,

Ltd.; and the Gramophone Co., Ltd. The respondent has stipulated that these companies have aggregate assets of more than a billion dollars (A. 91-100).

Since these companies are not subject to the injunction entered only against HRI in this case, the deterrent effect of an enforced treble damage judgment is necessary to serve "the high purpose of the antitrust laws" in opening up foreign markets to American electronics companies. The relief granted Zenith in the instant case must of necessity redound to the benefit of other American companies seeking access to these foreign markets.

We submit further that in viewing respondent's activities in this case, it should be borne in mind that the trial court found that the respondent started the present suit pursuant to the Canadian conspiracy (A. 11, 2857) and that this suit, as respondent's counsel has admitted in open court, is part of an effort to enforce the patent restrictions against imports imposed by the Canadian pool (A. 131-2).

In its last opinion, just as it had in its first, the court below has ignored the principles set forth in this Court's opinion that "an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact who is usually in a superior position to appraise and weigh the evidence" (AA. 22-23).

In its latest opinion, the court below in setting aside the trial court's findings on the amount of petitioner's damages has treated the case as if the amount of damage must be computed as allocated to particular overt acts done pursuant to the conspiracy within the damage period. The fact that this is a suit to recover lost profits over a particular period of time is completely ignored as well as the decisions of this Court dealing with that issue when the "fact of damage" has been proved.

Here this Court has held that the fact of damage is abundantly proved and that "the Court of Appeals is clearly in error" in holding that it was not.

This Court, in dealing with the first opinion of the court below said (AA. 22):

> "In this respect the Court of Appeals both gave insufficient deference to the findings of the trial judge and failed to adhere to the teachings of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946), and other cases dealing with the standard of proof in treble-damage actions."

These remarks are even more pertinent to the last decision of the court below where a standard of damage proof has been raised which not only reverses *Bigelow* but would make proof of lost profits in the case of exclusion from a market utterly impossible.

This Court analyzed *Bigelow* as follows (AA. 23-24):

> "In *Bigelow*, a treble-damage plaintiff claimed injury from a conspiracy among film distributors to deny him first-run pictures. He offered evidence comparing his profits with those of a competing theatre granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This Court, reversing the Court of Appeals, found the evidence sufficient to sustain an award of damages. Although the fact finder is not entitled to base a judgment on speculation or guesswork,
>
> > 'the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, juries are allowed to act upon probable and inferential, as well as direct and positive proof. *Story Parchment Co.* v. *Paterson Co., supra*, 561-564; *Eastman Kodak Co.* v. *Southern Photo Co., supra*, 377-379. *Any other rule would enable the wrongdoer to profit by his wrongdoing at the ex-*

> *pense of his victim.* It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.' 327 U. S., at 264-265." (Italics ours)

The Court below could not have paid any attention to that rule and reached the result that proof of petitioner's damages shown by this record was insufficient as a matter of law. Thus, the court below says (AA. 59):

> "The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor."

The court below then says (AA. 59-60):

> "There was testimony for Zenith, relied on by the district court, that in the four year damage period, had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, *it would have enjoyed the same proportion of that market as it did in the United States market.* In Canada its principal competitors were the same as those in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. *It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 264-65 (1946)."

It must be apparent to this Court that in the absence of any contradicting evidence, the proof was not only *prima facie* upon which the amount of damage could be reasonable approximated but conclusive.

This should have ended the issue of amount of petitioner's damages but the court below seizing on a statement in this Court's opinion and quoting it out of context, says (AA. 57):

> "The Supreme Court in noting that the district court did not date the events as occurring before or after the May 22, 1959 start of the damage period, said '[T]he damage award was confined to *injuries* sustained during the damage period, but the trial court apparently deemed it immaterial whether the damage causing acts occurred before or after the start of the damage period.' (Citation.) Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had 16 per cent of the Canadian market instead of its actual 3 per cent on May 22, 1959 and throughout the damage period. The court then said that since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency and therefore pre-damage period conduct necessarily resulted in some part of the damages awarded."

This statement by the court below ignores four controlling considerations which negative the effect which the court below concludes must result in a smaller damage award than that granted by the trial court.

First, if the damage award was to be reduced by the damage caused by predamage illegal activity, it was incumbent upon the respondent to show this and there is no such proof in the record.

Second, this Court did not say that the fact that "the trial court deemed it immaterial whether the damage causing acts occurred before or after the start of the damage period" was error. In fact it said exactly the opposite. It said at (AA. 14):

> "It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not

exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 702 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 143-4 (1968) (concurring opinion)."

Third, this Court said that irrespective of pre-damage period acts there was enough evidence to support the damage award within the four-year damage period. It said (AA. 19):

"We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. We need not merely assume that the Canadian pool continued throughout the period of this suit, as we are entitled to do in the absence of clear evidence of its termination. (Citations.) HRI frankly conceded the continuation of the pool before the District Court, and it appears sufficiently clear that throughout this time Zenith was deprived of what had always been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada."

This raised the question of the value of the license to Zenith, if freed from the restrictions of the pool, a question determined by the trier of fact with competent evidence in the record.

Fourth, the statement of the court below that Zenith's damage award can be cut down by damage incurred prior to the damage period stems from HRI counsel's argument that since Zenith did not have a mature market at the start of the damage period it could not start its damage computation as if it had the same share of the Canadian market in May 1959 as it had of the market in the United States. *This argument ignores the fact that the reason it did not have a mature market position was because of respondent's illegal conduct.*

The *Bigelow* case, which this Court expressly directed the court below to follow, completely destroys the HRI argument. In that case (327 U. S., 251, 265) this Court said:

> "The wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable.

No proof of whether or not in an open and unrestricted market, Zenith would have had a mature market was possible in Canada on May 22, 1959 because the illegal pool had destroyed an open market and therefore any possibility of such proof. Parenthetically, in the *Bigelow* case, there was no proof that the Jackson Park Theatre had a mature market position with reference to first run films at the time of the start of the damage period. Nevertheless, this court approved the damage computation which assumed such mature market position and approved such assumption over the objections of opposing counsel.

As a practical matter a comparison of Zenith's results in a closed market with those in a free market is the best, and in the instant case the only proof available. To require greater precision and specificity, as the court below attempts *would place the burdens of uncertainty on the victim and not on the wrongdoer where it properly belongs,* and would enable the antitrust violator to diminish his liabilities in direct ratio to the success of his predatory venture. See *Continental Ore Co.* v. *Union Carbide Corp.,* 370 U. S. 690, 697 (1962) and cases there cited.

Actually no objection of any kind was made to petitioner's damage exhibits at the trial. They were admitted in evidence even though they assumed that absent the illegal conspiracy Zenith would have had a mature market position at the beginning of the damage period. The ob-

jection now urged to the damage proofs was not made at the trial and in any event under *Bigelow* it had no merit.

We submit that the proofs of the amount of damage are beyond attack in this case. As the court below itself said in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561, 566 (7th Cir., 1951), in dealing with similar contentions and similar exhibits:

> "Neither do we need to follow defendants in their detailed argument designed to show numerous fallacies and inaccuracies in the exhibit prepared and submitted by plaintiff's accountant, for the reason that under the rationale of the *Bigelow* case we are satisfied that it was within the province of the trier of the facts to rely upon the computation there disclosed, providing, of course, there was proof of the fact of damage."

Here this Court has already held that there is conclusive proof in the record of the "fact of damage".

II.

THE DECISION OF THIS COURT IN THE INSTANT CASE GAVE THE COURT BELOW NO AUTHORITY TO GRANT A NEW TRIAL ON THE CANADIAN DAMAGE ISSUE.

The court below, without any showing that the trial court abused its discretion in denying a new trial on the Canadian damage issue, has granted a new hearing in the trial court, limiting the issues to be tried in a manner that destroys petitioner's right to recover treble damages for its loss of profits in Canada during the damage period. This it has done in the face of its own decisions that refusal by a trial court to grant a new trial is not subject to review "except upon exceptional circumstances showing a clear abuse of discretion." *Stinebower* v. *Scala*, 331 F. 2d 366, 367 (7th Cir., 1964).

There is no claim that the evidence sought to be offered at a new trial was either unavailable at the time of the original trial or could not have been then offered. In the circumstances it is impossible to conclude that the trial court's denial of HRI's "belated" request to reopen the Canadian damage issue was improper. Cf. *Marconi Wireless Corp.* v. *United States,* 320 U. S., 1, 48 (1943).

Recognizing that the record shows no abuse of discretion on the part of the trial court, HRI counsel say in their brief opposing Zenith's motion for leave to file a petition for mandamus (Misc. No. 1338, Oct. Term, 1969) at p. 31:

> "Thus, this case does not involve questions concerning abuse of discretion or of 'newly discovered evidence' but rather an erroneous ruling of law by the trial court, which, when corrected by the court of appeals required further hearings on the amount of damages."

However, the opinion of the court below grants a complete new trial on the damage issue and gave HRI "an opportunity to introduce evidence to show that Zenith's damage flowing from 'damage causing' acts within the period did not amount to $6,297,391" (AA. 61). This HRI had full opportunity to do before the trial court made its findings. The trial court said: (A. 3527) "The record I want to indicate at this time—there has to be an end of litigation. I don't intend to permit a second chance to do the things that might have been done at the first trial."

The evidence referred to is not limited to "newly discovered evidence" and it has been conceded by HRI that there is not any such evidence (AA. 156).

In the case of *In Re Potts,* 166 U. S. 263, 267 (1897), this Court said:

> "When the merits of a case have been once de-

cided by this court on appeal, the circuit court has no authority, without express leave of this court, to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment of the answer."

The court below has done all of these things with no leave from this Court either express or implied.

The new trial order is limited in such a way that petitioner's damage proofs would be limited to specific items of damage *allocated to specific overt acts.* This completely overrules this Court's opinion that "there is evidence that the pool was not dormant after May 1959. The record contains a letter from the pool to a distributor of Motorola products containing clear warnings against handling unlicensed, imported merchandise. More significant, the fair import of testimony of Zenith officers was that the pool remained active during the damage period and prevented Zenith from establishing an effective distribution system throughout Canada. Zenith was able to obtain independent distributors in the Western Provinces, but it was unable to do so in the Central and the Maritime Provinces, where it necessarily relied on its own subsidiaries for distribution. These officers, experienced businessmen, also testified to the similarities between the Canadian and American markets, attributing Zenith's much poorer Canadian performance to the discouraging and repressive effects of the pool. The Court of Appeals did not refuse to credit this testimony, as HRI insists we should do, but accepting it as some evidence of damage, considered it of insufficient weight to prove injury to Zenith's business. In this respect the Court of Appeals both gave insufficient deference to the findings of the trial judge and failed to adhere to the teachings of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1945), and other cases dealing with the standard of proof in treble-damage actions" (AA. 22).

That the court below still gives no deference to the findings of the trial judge is shown by the fact that it has vacated the damage findings and judgment and ordered a new trial.

That the court below still refuses to adhere to the teachings of *Bigelow* is shown by the fact that it says that Zenith is only entitled to recover for "an overt act that results in damage to the plaintiff" (AA. 57). That the Court of Appeals does not regard the continuance of the conspiracy and operation of the pool into the damage period as an overt act from which damage may be recovered is shown by its statement that "consequently in the case before us the mere existence of the conspiracy following the 1957 releases does not itself give rise to Zenith's cause of action" (AA. 57).

The court then says, contrary to the express provision of the statute, that the statute of limitations "commences to run from the last overt act of the conspiracy" (AA. 58). The court below apparently believes the only overt act which Zenith is entitled to recover for during the damage period is the June 5, 1959 letter to Zenith from the Canadian pool because the court below says the permissible damage period does not start until June 5, 1959. The court below then finds this act "similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damage suffered only in the statutory period is entitled to recover for the damages it suffered as a result of the June 5th injury" (AA. 59). The allowance of damages based on a comparison of profits in the restricted markets with those in the United States which this Court approved has been reversed. Further the court below reserves the right to rule on whether the award in a new trial may be "excessive", thus dealing with the case as if it were a personal injury suit (AA. 59).

This Court in *Story Parchment Co.* v. *Paterson P. Paper Co.*, 282 U. S. 555 (1931) disposed of any contention that a reviewing court is free to set aside a judgment based on competent evidence because the court may think it excessive. There this Court said at p. 562:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage . . . The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

See also, *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379 (1927).

We submit that the sort of limitation imposed on the proof of damages contained in the new trial order of the court below would have completely precluded petitioner's damage proofs in *Bigelow* and if allowed to stand, decisions on treble damages rendered by this Court are no longer the law in the Seventh Circuit. The decision of the court below imposing conditions upon the treble damage suit not sanctioned by the Act is a matter of grave public concern because it makes the recovery of treble damages under the antitrust laws impossible in the Seventh Circuit.

Further, it is contrary to the policy of the federal courts as approved by this Court that: "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery." *Story Parchment Co.* v. *Paterson P. Paper Co.*, 282 U. S. 555, 565 (1931). See also *Palmer* v. *Connecticut R. & Lighting Co.*, 311 U. S. 544, 559 (1941) and cases there cited.

III.

THERE IS NO MERIT IN THE BELATEDLY RAISED DEFENSES OF THE STATUTE OF LIMITATIONS AND RELEASE AND THEY WERE WAIVED BY RESPONDENTS' FAILURE TO PLEAD THEM IN ITS ANSWER.

The court below says, in referring to this Court's opinion "The Court also reversed our decision setting aside the award of damages flowing from the unlawful activity of the Canadian pool and remanded that issue to us to consider the effect of HRI's affirmative release and statute of limitations defenses on the award" (AA. 55).

This Court's opinion will be searched in vain to find any remanding order express or implied, for further consideration by the court below of the issues of limitations and release. However, assuming, arguendo, that the court below had this Court's permission to rule on them, the court below has committed clear error in its disposition of these issues in its last opinion.

A. The Statute of Limitations Is Not Applicable to Zenith's Damage Claim.

In using the "belatedly raised" defense of limitations as a basis for granting a new trial, the court below has attempted to turn the clock back to the earlier cases where the courts even attempted to use the limitations statute to bar proofs of the conspiracy itself. See the discussion of this tactic in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 699 & 709-10 (1962), where this Court said:

> "... '[T]he character and *effect* of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States* v. *Patten*, 226 U. S. 525, 544 ...; and in a case like the one before us, the duty of the jury was

to look at the whole picture and not merely at the individual figures in it, . . .

"The trial court further erred in its persistent exclusion of evidence relating to the pre-1938 period, . . . This evidence was clearly material to petitioner's charge that there was a conspiracy and monopolization in existence when they came into the industry, and that they were eliminated in furtherance thereof." (Italics ours.)

Here the court below has adopted an ingenious argument inspired by HRI counsel that the statute of limitations can be used to bar proof of overt acts outside the damage period even though the damage caused by these acts does not accrue until a time within the damage period. This is a construction which this Court has held as not justified by the antitrust laws.

This Court, in the case of *Radovich* v. *National Football League*, 352 U. S. 445, 453-454 (1957) said:

"Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' . . . and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public . . . Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

Applying the above test, it appears beyond peradventure that the position of the court below is completely untenable under the terms of the Clayton Act itself.

Thus, the statute on which the court below relies is 15 U. S. C. § 15(b) which reads:

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

The important words to be construed are "four years after the cause of action accrued." In the instant case the court below has interpolated into the act the words "overt acts" which if occurring prior to the damage period are barred by limitations even though the damage caused does not accrue until the beginning of the damage period. The court below says: "The law with respect to the statute of limitations in Sec. 15(b) of the Clayton Act is that the period commences to run from the last overt act of the conspiracy" (AA. 58). Based on this false premise the court below held that acts prior to the damage period are barred by limitations even though the damages they caused did not accrue until a time within the damage period. It is quite apparent that the Act says no such thing. It says that the period commences to run when the cause of action "accrued," and under Section 4 of the Clayton Act the cause of action does not accrue until the damage is occasioned.

In the case of *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. 2d 742, 750 (9th Cir., 1936), cert. den. 299 U. S. 613 (1937), the Court of Appeals correctly states the rule as follows:

> "In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom. The fact that there may be a criminal conspiracy does not give a plaintiff an action for damages under section 7 of the Antitrust Law, 15 U. S. C. A. § 15 Note, *supra*. *Glenn Coal Co.*

v. *Dickinson Fuel Co.*, 72 F. 2d 885; *Strout* v. *United Shoe Machinery Co.*, 208 F. 2d 646, 651. The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. *Morris & Co.* v. *Nat'l. Ass'n. of Stationers* (C. C. A.), 40 F. (2d) 620. The cause of action arises *when the damage is sustained* and the statute of limitations begins to run at that time." (Italics ours.)

This Court, in its prior opinion, recognized that it was irrelevant whether prior acts of this conspiracy which had occurred outside the damage period had prevented an earlier start in business by Zenith in Canada, if the damage occasioned thereby did not accrue until a time within the damage period, stating (AA. 18):

"This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith's products in 1959 and later years. The district court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period. It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

Thus, unlawful acts or activity resulting in loss of profits during the damage period was not barred by the statute of limitations under the terms of the Act itself and this Court in a recent case has expressly held that the statute of limitations only bars recovery of damages occurring before the four-year statutory cut-off date. See *Hanover Shoe Inc.* v. *United Shoe Mach. Corp.*, 392 U. S. 481, 501, n. 15 (1968), where this Court says:

"We are not dealing with a violation which, if it

> occurs at all, must occur within some specific and limited time span . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955."

The Court of Appeals in the same case said, 377 F. 2d at p. 795:

> ". . . the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period."

The only damage sought or recovered in the instant case was the loss of profits occurring in the four-year damage period.

Finally, this Court indicated that the statute of limitations even if applicable would not run during the pendency of the instant suit and that the counterclaim would relate back to the filing of the instant suit, thus making the entire limitations issue irrelevant because there is no evidence that beginning four years prior to November 20, 1959 when the suit was started and in the intervening time up and until the beginning of the damage period Zenith absent the Pool could not have gained a mature market position. In fact every inference is that Zenith would have had ample time to do just that.

B. The Statute of Limitations Was Tolled in the Instant Case.

The Court of Appeals held not only that HRI was entitled to reduce the damage award by any damages found to be attributable to pre-damage period acts irrespective of whether the damage accrued during the damage period,

but also held that petitioner was precluded from asserting that the statute of limitations was tolled. Petitioner asserted in the court below and here that the statute was tolled during, and for one year after, the pendency of *United States* v. *General Electric et al.* (Civil Action No. 140-157, S. D. N. Y.), in the Southern District of New York from November 24, 1958 to November 1, 1963 (Pl. Ex's. 44-47, A. 2754-82).

The court below based its holding on the grounds (1) that the issue was not before the court because Zenith had not pleaded tolling, and (2) that in any event, under its earlier *Sun Theatre* decision, 213 F. 2d 284, 292, tolling did not apply to a named co-conspirator such as Hazeltine, but only applied to a party defendant in the government suit.

In answer to the first contention, it is apparent that there was no opportunity to plead tolling in the trial court since recovery of damages was limited to the four-year statutory period and the statute of limitations was not pleaded until a year after the trial, at which time the trial court properly refused to reopen the case. There was no duty on Zenith's part to anticipate this affirmative defense by pleading tolling in its counterclaim nor would Zenith be required to file a further pleading in response to the defense of limitations even if it had been asserted in the respondent's reply to the counterclaim as required by Fed. R. Civ. P. 8(c). Fed R. Civ. P. 7 expressly states that there shall only be a reply to a counterclaim and that "No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer." No court ordered Zenith to file a further pleading in response to the plea of limitations which HRI tendered in support of its motion to dismiss one year after the case had been tried.

In answer to the second contention, it is sufficient to point

out that the earlier case of *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F. 2d 284, 292 (7th Cir., 1954) which the court below relied upon in saying "in any event, the law of this circuit is that the tolling of the limitation protects a plaintiff in a private antitrust suit only with respect to a party defendant in a government suit" (AA. 59) is in direct conflict with the decisions of this Court and of the Court of Appeals for the Third and Eighth Circuits.

The *Sun Theatre* case was decided before § 5 of the Clayton Act was amended by the Congress in 1955. After the amendment of the statute, the Eighth Circuit squarely decided that the statute of limitations was tolled as to named co-conspirators in a government action. *Hardy Salt Co.* v. *State of Illinois*, 377 F. 2d 768 (8th Cir., 1967), cert. den. 389 U. S. 912 (1967). This decision was subsequently extended by the Third Circuit which held that the tolling provisions of Section 5(b) applied to unnamed co-conspirators as well. *State of New Jersey* v. *Morton Salt Co.*, 387 F. 2d 94 (3rd Cir. 1967), cert. den. 391 U. S. 967 (1968). Hazeltine was a *named* co-conspirator in the government action against General Electric, et al, and the conspiracy asserted there was found by the court below to be the same as the one asserted here.

The construction adopted by the court below in the 1954 *Sun Theatre* case that tolling only occurred when a judgment or decree would have an estoppel effect was expressly rejected by this Court in *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965), and *Leh* v. *General Petroleum Corp.*, 382 U. S. 54 (1965). Parenthetically, in *Leh*, tolling was not pleaded in the complaint and was raised for the first time after defendants had moved for summary judgment on the ground the action was barred by the limitations defense raised in the answer.

C. The RCA-Zenith 1957 Release Did Not Affect Zenith's Treble Damage Claim Based Upon Damage Occasioned Zenith from June 1, 1959 to May 31, 1963.

The court below said in its last opinion "Since HRI was an unnamed joint tortfeasor, as admitted by Zenith at trial, with its co-conspirators in the Canadian pool who were named in the *Rauland* case, and Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases" (AA. 57).

This statement not only extends the common law rule as to releases but attempts to bar Zenith's recovery for damages occasioned by the Canadian pool after October, 1957, the date of the release. This, of course, is against public policy. In *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 39 F. Supp. 117, 119 (S. D. N. Y., 1941), aff'd. 136 F. 2d 844 (2nd Cir., 1943), the District Court said in speaking of a similar release:

> "Indeed, if the instrument purported to absolve defendants from liability for future violation of the anti-trust statutes, I should hold it void as against public policy . . . in my opinion defendant's contention that the release is a bar as to causes of action subsequently arising cannot be sustained."

We have already shown above that the instant case is a cause of action "subsequently arising" because the damages accruing during the damage period were not in existence until the damage period—and could not have accrued at all if the Canadian Radio Patents Pool had been ended. Cf. *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79, 81 (2nd Cir., 1939).

In the trial court, HRI counsel in colloquy with the Court said ". . . there are cases which say if you try to

release the effect of a future violation that that is against public policy" (AA. 229). Certainly this Court has never sanctioned the release of a future violation of the antitrust laws. If that could be so, then HRI had a blank check to continue the pool, which during its entire existence threatened the same illegal conduct which was in issue in the RCA litigation. Further, Zenith could not sue for its lost profits for the damage period starting in May, 1959 in September, 1957 when the release was executed. For these damages to accrue, two things were necessary:

(1) The Canadian pool had to continue in operation from 1959 through the damage period; and

(2) The operation of the pool had to continue to restrict Zenith's profits in Canada.

In *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322 (1954), this Court said at 327-8:

> "That both suits involved 'essentially the same course of wrongful conduct' is not decisive . . . While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."

That this Court, in view of the public interest involved in the enforcement of the antitrust laws, is not inclined to extend common law doctrines of constructive release in order to bar a plaintiff's suit for treble damages is shown by the case of *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U. S. 661, 670 (1943) where this Court expressly approved the statement that:

> "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

In the case of *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942), the common law doctrine of estoppel was sought to be asserted to preclude proof of a violation of the antitrust laws by price fixing agreements attached to the license of a patent. This Court said, at p. 176:

> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield . . . The federal courts have been consistent in holding that local rules of estoppel will not be permitted to thwart the purposes of statutes of the United States."

Here, the court below has allowed the common law rule of constructive release to destroy petitioner's rights in part at least against HRI, which paid nothing to petitioner, and which was not named in the release, thereby thwarting the policy of the antitrust laws to deter the denial of a foreign market in Canada to petitioner. The issue is one of first impression in this Court and is one we submit which should be decided with the policy of the federal statute in mind so as to further the high purpose of the antitrust laws.

In *Fox Midwest Theatres* v. *Means*, 221 F. 2d 173, 180 (8th Cir., 1955), the Court of Appeals said:

> "Any contractual provision which could be argued to absolve one party from liability for future violations of the antitrust statutes against another would to that extent be void as against public policy. . . . This is because the effect of such a release could be to permit a restraint of trade to be engaged in, which would have impact, not simply between the parties, but upon the public as well. Such a release, if recognized as having

any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade.' Section 1 of the Sherman Anti-Trust Act, 15 U. S. C. A. § 1, of course, brands all contracts in restraint of trade as 'illegal.' "

The effect of the holding of the court below is that a release given to some of HRI's co-conspirators in 1957 granted HRI and the pool immunity to operate forever free from treble damage suits and even though this Court expressly finds the pool in operation all during the damage period and causing damage to Zenith during all that time. This Court said in its opinion (AA. 14):

"Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble damage liability of the domestic companies participating in the conspiracy was beyond question."

D. In Any Event the Affirmative Defenses of Statute of Limitations and Release Were Waived.

The court below says in its last opinion (AA. 56):

"The Supreme Court noted that the district court's refusal to disturb the findings it had already made with respect to the Canadian pool *was a rejection of the defenses either on the merits or on the ground that the defenses had been waived under Fed. R. Civ. P. 12 (h). 395 U. S. 100, 117, n. 13. It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery.*"

There is nothing in this record to support the view that the District Court's ruling was not based on waiver. In fact the opposite appears by the following colloquy (AA. 237):

"The Court: You do agree that the statute of limitations can be waived, you do agree to that, don't you?

"Mr. Kayser: Yes, but I shall come to that in a moment, sir."

The Court of Appeals attempts to get rid of the waiver issue by simply ignoring it and we submit that handling of the matter cannot be sustained. This Court has held that the decision of a trial court can be affirmed on any ground shown in the record. See *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937) where this Court said, at p. 245:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

Under the decision of this court in *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588 (1911), "As the case is here upon certiorari to review the judgment of the circuit court of appeals, this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done . . ."

The waiver shown in the instant case is abundantly supported by the record of proceedings on the motions filed by respondent after the case was decided. The affirmative defenses of the statute of limitations and release were not presented until a year after the case had been tried and the trial court had entered its findings of fact and conclusions of law. The record of these proceedings which has now been printed in full (AA. 65-254) show beyond question that the trial court considered these defenses belatedly presented and waived.

The federal precedents hold that "an affirmative defense which is neither pleaded as required by rule 8(c) nor made the subject of an appropriate motion under rule 12(b) is waived. The waiver is final if the defendant fails to correct the omission either prior to trial or during trial, as is permitted by rule 15 (a) (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A." *Systems, Inc.* v. *Bridge Elec-*

tronics Company, 335 F. 2d 465, 466 (3rd Cir., 1964). See also *Wagner* v. *Fawcett Pubn's.,* 307 F. 2d 409, 412 (7th Cir., 1962) cert. den. 372 U. S. 909 (1963).

Rule 8 (c) provides "In a pleading to a preceding pleading, a party shall set forth affirmatively . . . release . . . and any other matter constituting an avoidance or affirmative defense . . ."

In *Roe* v. *Sears, Roebuck & Co.,* 132 F. 2d 829, 832 (7th Cir., 1943), the court below said:

> "Defendant's motion for summary judgment was not made until after it had filed its answer. Rule 8(c) of the Rules of Civil Procedure requires a party 'pleading to a preceding pleading [to] set forth affirmatively . . . [the] statute of limitations.' Rule 12 provides that the party 'waives all defenses * * * which he does not present . . . in his answer."

The Court went on to say that waived defenses could not be revived by a defendant through the expedient, used in the instant case, of filing a motion for summary judgment.

> "Defendants having failed to plead the statute of limitations, it was waived. Defendants subsequent motion for a summary judgment did not revive a defense which had been waived. . . ."

See also *Tornello* v. *Deligiannis Bros.,* 180 F. 2d 553, 556 (7th Cir., 1950); *Oedekerk* v. *Muncie Gear Works,* 179 F. 2d 821, 842 (7th Cir., 1950).

Here, HRI never even asked for leave to amend its answer to plead the statute of limitations and release defenses but attempted to raise them on motion for summary judgment more than a year after the case had been tried.

The District Court held that HRI showed no adequate grounds to excuse the late pleading of these affirmative

defenses. That the record shows no basis for reviving these defenses after they had been waived is established by the following: The only ground urged then or since by HRI to permit it to file its defenses a year and a half later was that Zenith had changed its damage theory to the surprise of respondent (A. 2943). HRI counsel expressly disclaimed that HRI was seeking to reopen the proofs on the basis of newly discovered evidence (AA. 156).

The District court rejected HRI's change of damage theory, out of hand, as a sham, pointing out that the pleadings and pre-trial briefs made Zenith's damage theory plain to anyone able to "understand the English language" (AA. 144, 158, 74, 87).

The district court permitted HRI leave to file the defenses of limitations and release for "the sake of the record" (AA. 164, 251). This HRI had a right to do even if it had not been ordered because the Clerk of the Court does not refuse the filing of documents in a case. In answer to Zenith's objections that the defenses were not filed with the answer and therefore waived, the district court said "the record will show that leave is given to file them at this time [April 1, 1965] after proofs have been closed and after findings have been made." (AA. 251). The court then proceeded to deny HRI's motion to withdraw the findings and reopen the proofs as to Canada (AA. 251).

The Court said (AA. 251):

> "In regard to Canada there will be no change in the findings as far as the court is concerned."

Since the motion to withdraw the findings and dismiss the counterclaim as to Canada was based on the same grounds as those urged to excuse the late pleading of the affirmative defenses—namely, that Zenith had changed its theory of action—the denial of the motion was necessarily a rejection of these grounds and a holding that the defenses

were as this Court put it—"belatedly raised" and therefore waived.

CONCLUSION.

For the reasons set forth above, Zenith prays that the decision of the court below be reversed with directions that the judgment entered by the District Court on April 5, 1965, be affirmed together with statutory interest thereon.

Respectfully submitted,

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